Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CATALINO TORRES MALDONADO
AND
MARILYN GOTAY COLON
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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June 6, 1994

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QUESTION PRESENTED

Should an accused be denied a petition for severance where such denial was based on the unnecessary confrontation of his Sixth Amendment Rights with the Fifth Amendment Rights of a codefendant.

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No. __

IN THE

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CATALINO TORRES MALDONADO
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Petitioners,

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UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE COURT:

The petitioners, Catalino Torres-Maldonado and Marilyn Gotay-Colón, very respectfully pray that a *writ of certiorari* issue to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit entered against them in this case.

OPINIONS BELOW

Order of the District Court for the District of Puerto Rico in the case of United States of America, Plaintiff v. Frankie Nieves Burgos a/k/a Kenny Ramirez a/k/a Pedro Medina Rivera, Catalino Torres Maldonado, Marilyn Gotay-Colón, Hector Santiago-Alicea, Teddy Leon-Ayala, and Oscar Diaz Cruz a/k/a Oscar Santiago, Defendants. Criminal No. 91-159 (RLA) rendered January 9, 1992. App. p. 1-2.

Opinion of the United States Court of Appeals for the First Circuit in the case of United States, Appellee v. Catalino Torres-Maldonado and Marilyn Gotay-Colón, Defendants-Appellants, Case No. 92-1849 rendered January 20, 1994. App. p. 3-20.

Order denying Petition for Rehearing filed before Court of Appeals for the First Circuit in the case of United States v. Catalino Torres-Maldonado and Marilyn Gotay-Colón, Case No. 92-1849 rendered on March 7, 1994. App. p. 21.

JURISDICTION

The Judgment of the Court of Appeals for the First Circuit was entered on January 20, 1994. A timely petition for rehearing was denied on March 7, 1994, App. p. 36, and this petition for certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the Constitution of the United States.

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself,** nor be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI to the Constitution of the United States.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; **to have compulsory process for obtaining witnesses in his favor**, and to have the assistance of counsel for his defense.

Amendment XIV to the Constitution of the United States.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws**.

STATEMENT OF THE CASE

On September 30, 1991 an evidentiary hearing was held in the instant case, at District Court level, in order to determine the appearing parties' request for severance of their trial.The Magistrate/Judge presiding the aforementioned hearing determined that the necessary requirements in order to grant the motion for severance were present and accordingly recommended granting of the motion requesting severance. Attached to the Motion for Severance was a Sworn Statement from codefendant Hector Santiago-Alicea in which he stated his clear and unequivocal intention of testifying, only at a separate

trial, to the fact that petitioners herein were totally unaware of any activities related to drugs or firearms, as charged in the Indictment, and that the couple had only come to the Carib Inn Hotel in order to collect final payment for the sale of a car, a fact as to which only Hector Santiago Alicea had personal knowledge. Santiago-Alicea's Statement, issued under penalty of perjury conforming to 18 U.S.C. § 1621(1), totally exculpated petitioners herein from the charges of the Indictment. Corroborating witnesses available to the defense demonstrated the validity of Santiago Alicea's testimony.

However, on February 7, 1992 the District Court Judge, without a proper hearing or confrontation requirement, denied petitioners Joint Motion for Severance after a finding that codefendant Hector Santiago-Alicea did not wish to testify at any trial and would not do so even if severance were to be granted to his codefendants.The Lower Court did not investigate the reason for the "change of heart" and simply instructed the undersigned counsel, now attorney of record, through an Order of February 7th, 1992 that it would not allow Mr. Santiago-Alicea to be subpoenaed at this or any other trial as this would violate his Fifth Amendment Rights under the Constitution of the United States. Such denial precluded and dismissed petitioners rights under the Sixth Amendment of the Constitution.

On the strong and substantial showing of prejudice that the appearing party has consistently established in compliance with the First Circuit Court of Appeals' case law, and on the analysis of the miscarriage of justice that has been clearly perpetrated, this most Honorable Court should issue the herein requested certiorari and vacate the Lower Court's denial of the request for severance and the conviction resulting thereof.

ARGUMENT

Miscarriage of justice for deprivation of a fair trial

The denial of the severance requested in this case definitely deprived petitioners of a fair trial resulting in a miscarriage of

justice. See *United States v. Albert*, 773 F.2d 386, 388 (1st Cir. 1985). On such circumstances this most Honorable Court should issue the herein requested petition for certiorari. A fair trial in the instant case could only have taken place if severance was granted.

In a case with very similar facts as the present one, the Court of Appeals for the Eleventh Circuit sustained that due process required severance. In such case due process required severance of defendants and separate trial of a codefendant whose affidavit indicated that defendants were not involved in conspiracy with codefendant and that defendants had no knowledge of arrangements for shipments of allegedly obscene materials for common carriage in interstate commerce; even if defendants could have testified to those matters themselves severance was required. See *United States v. DiBernardo*, 880 F.2d 1216 (11th Cir. 1989). As a matter of fact in the instant case the codefendant Santiago-Alicea had firsthand knowledge of the exculpatory information regarding petitioners herein.Hector Santiago Alicea was the best witness there could be to testify on the true reasons for petitioners being at the place where the arrests took place. Judicial economy must yield to a defendant's right to a fair trial. *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970).

A miscarriage of justice was clearly produced in the instant case since the outcome of the same is definitely inconsistent with the substantial rights of petitioners herein.There was much more than a reasonable probability that petitioners herein would have been found innocent if their Joint Motion for Severance was granted: their innocence would have been determined. Petitioners had a substantial and essential right of having exculpatory evidence presented in their favor before the jury. Such right was erroneously disregarded without a profound analysis upon codefendant's assertion of another substantial right.Upon the confrontation of two (2) constitutional rights as the ones involved here the District Court had the obligation to make a detailed and informed determination

before deciding that petitioners Sixth Amendment Right had to bow to accommodate Hector Santiago-Alicea's alleged Fifth Amendment Right. *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Berger v. California*, 393 U.S. 314, 315 (1969). Further there is no doubt that on making the mandated examination the inquiry must have revolved around the substantial danger of prejudice that could be created by depriving a defendant of presenting an adequate defense. *Turner v. Fair*, 617 F.2d 7, 10 (1st Cir. 1980).The Lower Court made no inquiry that would enlighten the obscure "change of heart" suffered by Mr. Santiago-Alicea.

The Lower Court erred when it determined, without a hearing or any basis in fact or evidence, that it would void the recommendation from the Magistrate/Judge who conducted a hearing on the merits of the request for severance and without a hearing to determine the reason for Santiago Alicea's "change of heart" but merely by confronting two (2) constitutional rights and then favoring one of them.A confrontation of two (2) constitutional rights as in the instant case required much more than what the record reflects.

The trial court's action constitutes a further violation of that which was specifically stated in the case of *United States v. Drougas*, 748 F.2d 8 (1st Cir. 1984) where the Court of Appeals for the First Circuit directed the court to make certain evaluations in order to decide to grant or deny a motion for severance. See also *United States v. Butler*, 611 F.2d 1066, 1071 (5th Cir. 1990); *United States v. Finkelstein*, 526 F.2d 517, 523-524 (2d Cir. 1975) cert. den. 425 U.S. 960 (1976); *United States v. Smolar*, 557 F.2d 13, 21 (1st Cir. 1971) cert. den. 434 U.S.A. 966 (1977).

Moreover, it has been sustained that the reluctance of a witness to testify at trial can be adequately established only by compelling his presence and questioning him before the court, but his testing need not take place before the jury. *United States v. Sanchez*, 459 F.2d 100 (2d Cir. 1972) cert. denied 409 U.S. 864 (1972). It has also been stated that a blanket assertion

is unacceptable, *United States v. Goodwin*, 625 F.2d 693, 700-01 (5th Cir. 1980). Usually, the privilege must be claimed separately for each question that the witness refuses to answer, and in general, the claim may not be asserted before the stating of the question. *United States v. Harmon*, 339 F.2d 354 (6th Cir. 1964) cert. denied 380 U.S. 944 (1965). See also *In Re Brogna*, 589 F.2d 24 (1st Cir. 1978). It comes then as a clear error from the trial court that it did not even conduct an examination to assert the seriousness of Hector Santiago-Alicea's claim that he would not testify at a separate trial because allegedly he would incriminate himself. This is all contrary to that expressed in *United States v. Reese*, 561 F.2d 894 (D.C. Cir. 1977): that before excusing a witness from testifying, the court must determine that the witness will assert the privilege as to essentially all questions which may be asked of him and whether reasonable grounds exist to fear incrimination. See also *United States v. Melchor Moreno*, 536 F.2d 1283 (7th Cir. 1976). Nevertheless, Santiago-Alicea never did assert his Fifth Amendment Rights, the Lower Court merely speculated that he would.

The result of the error is plainly a miscarriage of justice where the jury was not able to hear the exculpatory evidence in favor of petitioners which would have produced a different result.The jury was unjustifiedly prevented from making a reliable judgment about guilt or innocence (*Zafira v. U.S.*, 113 S.Ct. 933 (1993)) when the trial court affirmatively denied petitioners of the benefit of an elementary rule favorable to them, one to which they had a clear right, and one which is the corner stone of our system of justice. See: *Washington v. Texas*, 388 U.S. 14 (1967) and *Chambers v. Mississippi*, 410 U.S. 284 (1973) wherein the Supreme Court of the United States expressed the importance of the basic right of an accused to examine the witnesses against him. See also *Rock v. Arkansas*, 483 U.S. 44 (1987).

The District Court was aware of the risk of prejudice but different than in the case of *United States v. Walker*, 706 F.2d

28 (1st Cir. 1983) it did not analyze the proper factors in order to make a careful determination, therefore petitioners in the instant case suffered undue prejudice. Petitioners were unable to secure a fair trial because of the denial of the severance. A fair trial would have been a severed one in which petitioners could subpoena Hector Santiago-Alicea to testify and confront him with his previous statement. No matter what he would have testified, his testimony would have been exculpatory to petitioners since even by denying what was stated in the Sworn Statement, cross-examination would have provided the truth, then to be corroborated by other available evidence.The Court of Appeals position was that since Mr. Santiago-Alicea stated through his legal counsel that he had suffered a "change of heart" he did not wish to testify and therefore one of the elements for severance was missing.

In detriment of their legal right to have exculpatory evidence presented to the jury, petitioners were deprived of more than a better chance to be acquitted, *United States v. Martinez*, 479 F.2d 824, 828 (1st Cir. 1973), since if severance were granted they would have demonstrated their innocence. *Prewitt v. Goeke*, 978 F.2d 1073, 1078 (8th Cir. 1992).Petitioners have established that their Sixth Amendment Rights were more than compromised and was the basis for the Lower Court to grant Bail on Appeal. The prejudice is strongly evident.

Hector Santiago-Alicea could have been made available by the Lower Court

Hector Santiago-Alicea issued, under penalty of perjury conforming to 18 U.S.C. § 1621(1), a statement which totally exculpated petitioners from the charges of the Indictment. Specifically, at paragraph 12, he stated that "Mr. Catalino Torres Maldonado and his wife, Marilyn Gotay, were unaware of Hector Santiago-Alicea activities related to controlled substances and weapons." The exculpatory nature of such statement is evident.

Due to the importance and exculpatory nature of such a statement petitioners herein had the right, under the United States Constitution Amendment Nos. 6 and 14 to have compulsory process for obtaining Hector Santiago-Alicea's testimony on their behalf. Even if Hector Santiago-Alicea later had a change of heart and felt that he preferred not to testify, the Lower Court could not on its own determine, as it did, that Hector Santiago-Alicea's testimony would tend to incriminate him of perjury. There was no evidence or allegations from Hector Santiago-Alicea's testimony or from his legal counsel that would amount to incriminate him of perjury, thus the district court's determination was speculative, unwarranted and constituted a clear abuse of discretion on the denial of the severance. See *United States v. Gray*, 958 F.2d 9 (1st Cir. 1992).

On the other hand, the Government unreasonably and coercively opposed based on the blackmailish supposition that at a separate trial Hector Santiago-Alicea would incriminate himself in the event of subsequent prosecution by State authorities for exactly the same facts for which he was tried and found guilty in the federal jurisdiction.The Government's opposition was thus based on a speculation of an extremely remote event in attention to the long history of federal cases for the District of Puerto Rico which were never retried at state level unless extenuating or diverging circumstances existed. The possibility of such an unlikely event is present even now without Hector Santiago-Alicea's testimony in the severed trial. As a matter of fact, to this date Hector Santiago-Alicea has not been charged in any state court for these facts. Hence, the denial of the severance based on such contention is an error of the District Court: Codefendant Santiago-Alicea was not required to testify to anything that would expose him to state prosecution more than he was at time of trial or even today.

Petitioners duly complied with the requisites established for granting a severance

United States v. Drougas, supra (the leading case in the First Circuit regarding qualification for severance) established the following requirements for qualifying for a severance: (1) a bonafide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the codefendant will in fact testify if the cases are severed. Petitioners duly complied with all of the requirements hereinbefore enumerated.The fact that on September 30, 1991 Honorable Magistrate/Judge Justo Arenas went through all of the factors outlined in *Drougas* and determined that severance was appropriate shows petitioners' compliance.The only matter which had changed later was Santiago Alicea's availability to testify at a separate trial since he had had a "change of heart," a situation with which petitioners could have dealt with at a separate trial. Petitioners still had the possibility of having Santiago-Alicea subpoenaed to the same or a separate trial and confronting him with the statement he had given. Petitioners extensively briefed the Lower Court on their right to have compulsory process for obtaining witnesses on their behalf under the United States Constitution Amendments No. 6 and 14 while Santiago-Alicea asserted Fifth Amendment rights against self-incrimination. Even if defendant Santiago-Alicea was to take the stand and deny everything, confrontation with the statement and corroboration by the defense witness would have put any jury in a position to avoid a miscarriage of justice.

The Lower Court's denial of severance was based on the precepts established by *United States v. Zirpolo,* 704 F.2d 23 (1st Cir. 1983); *United States v. Albert,* supra. The District Court determined that it would not allow Santiago-Alicea to be subpoenaed at trial as his testimony may tend to incriminate him of perjury of other crimes. Additionally, the Lower Court determined that at that time he was entitled to assert his Fifth Amendment privilege. We agree with the Court's determination as to that which is decided by *Zirpolo* and *Albert* but we

very respectfully disagree as to their application to the facts of the case at bar.

In *Zirpolo,* supra, defendant requested that a sworn statement provided by one of his codefendants, in which he was exonerated from the charges against him, be admitted into evidence at trial or that he be allowed to subpoena said codefendant. The Court ruled that the document was inadmissible as it lacked proper corroboration and second that the codefendant was entitled to invoke his Fifth Amendment privilege against self-incrimination since he had not yet been sentenced and, therefore, might be incriminating himself of other crimes. *Zirpolo* did not request a severance. The Court of Appeals left the door open for the application of law to facts such as the ones at bar. Mr. Santiago-Alicea could not have invoked his privilege against self-incrimination since he had nothing to protect at a different trial, after sentencing, and therefore could have been subpoenaed by the petitioners at a separate trial and could have been forced to testify. *Zirpolo* establishes that under these circumstances Santiago-Alicea could not invoke his Fifth Amendment privilege against self-incrimination.

In *Zirpolo,* the First Circuit Court does not enter to determine the applicability to said Circuit of the case of *United States v. Pardo,* 636 F.2d 535 (D.C. Cir. 1980), and it specifically states that it does not need to make the determination at that time. In *United States v. Pardo,* supra, the Court determined that the privilege against self-incrimination ceases to apply once a witness has been convicted, whether by plea of guilty or following trial, of offense with respect to which he fears incrimination. A codefendant would not loose his Fifth Amendment Right to refuse to testify concerning other matters or transactions not included in his conviction or plea agreement. In the case at bar, from the Sworn Statement provided by Mr. Santiago-Alicea it was clear that he was only going to be requested to testify as to matters to which he had already been found guilty. *Pardo's* applicability to the First Circuit is still not decided. Conflicting Circuit Court decisions are presented

as grounds for the grant of the petition for certiorari herein requested.

The second case on which the Lower Court asserted its denial of severance was the case of *United States v. Albert,* supra. In *Albert,* the Court of Appeals for the First Circuit determined that a codefendant was entitled to invoke his Fifth Amendment privilege against self-incrimination and refuse to provide exculpatory testimony regarding a codefendant where his testimony would tend to incriminate him for perjury or in unindicted State crimes. In the case at bar we have no evidence whatsoever that Santiago-Alicea would incriminate himself for perjury and, certainly, there is no state prosecution for this narcotics case under federal jurisdiction. On the contrary, in *Albert,* the Court specifically states that "the waiver of privilege to be inferred from a guilty plea or sentencing is strictly limited and does not amount to a total surrender of the privilege with respect to other crimes." *United States v. Albert,* supra, at p. 389. Therefore, at a separate trial Santiago-Alicea could only invoke the privilege as to other matters, and not as to those to which he had given the Statement, since these were specifically limited to the case at bar, a case of which he already had been found guilty. Contrary to the facts in *Albert,* in this case Santiago-Alicea has only said that he would not testify; he has never said that he would change his testimony or that what he had already testified in the Statement was not the truth. There was no hearing to establish his purported incrimination.

A strong showing of prejudice was made

The First Circuit has expressed that the burden is upon petitioner to make a strong showing of prejudice in order to show that a denial of its severance motion constituted an abuse of discretion. See *United States v. Bautista,* 731 F.2d 97 (1st Cir. 1984); *United States v. Arruda,* 715 F.2d 67 (1st Cir. 1983); *United States v. Lochan,* 674 F.2d 960, 967 (1st Cir. 1982); and *United States v. Perkins,* 926 F.2d 1271 (1st Cir. 1991).

The prejudice alleged herein is far from speculative. Petitioners showed that in the absence of Hector Santiago-Alicea's testimony the jury would most probably lean towards the conviction of all the codefendants regardless of the justice of such act in the particular situation of petitioners herein: that clearly constitutes prejudice against petitioners herein. The Circuit Court's Opinion of January 20, 1994 focuses only on Santiago-Alicea's withdrawal of testimony but fails to consider the additional justifications created by the denial.

By being tried together with the other codefendants, petitioners herein were most probably judged on the basis of the evidence regarding all the other codefendants tried. Regardless of the instructions that may have been given to the jurors, the evidence against the other codefendants was so strong as to make the jurors believe that all codefendants were guilty as charged, including Catalino Torres-Maldonado and Marilyn Gotay-Colon, petitioners herein. See *United States v. Alemany Rivera*, 781 F.2d 229 (1st Cir. 1985). Proof of this is that at trial even the government witnesses on two (2) different occasions confused Mr. Torres-Maldonado with other codefendants. Furthermore, petitioners suffered the prejudice of being denied the right to present exculpatory material evidence available to them.The evidence could have been presented whether Mr. Santiago-Alicea wanted to testify or not by simply allowing petitioners to subpoena him at this or at a severed trial. The prejudice that petitioners suffered from such denial is more clearly evidenced by the result of the trial.

CONCLUSION

The fundamental rights of fair trial and compulsory process cannot be confronted with the right against self-incrimination in furtherance of a miscarriage of justice. Condoning such action without proper inquiry, and where each of the Constitutional Rights of those involved could have been protected by severance, would amount to anarchy in our system of justice.

In light of the above arguments which clearly and unambiguously show that a miscarriage of justice will be perpetrated in this case and that substantial prejudice is present in the manner the trial was conducted, depriving petitioners from their most essential rights, it is most respectfully requested from this Honorable Court that it grant the herein requested Certiorari.

RESPECTFULLY SUBMITTED.
San Juan, Puerto Rico, this 6th day of June, 1994.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,
plaintiff,

v.

FRANKIE NIEVES-BURGOS a/k/a Kenny Ramirez a/k/a José Herrera Rivera, PEDRO LUIS RAMIREZ-RIVERA a/k/a Pedro Medina Rivera, CATALINO TORRES-MALDONADO, MARILYN GOTAY-COLON, HECTOR SANTIAGO-ALICEA, TEDDY LEON-AYALA, and OSCAR DIAZ-CRUZ a/k/a Oscar Santiago,
defendants

ORDER

The Court has carefully considered defendants Catalino Torres-Maldonado's and Marilyn Gotay-Colón's Joint Motion for Severance (docket No. 95) and the Government's opposition thereto (docket No. 114). We have also carefully reviewed the Magistrate's Report and Recommendation (docket No. 122), the Government's objection thereto (docket No. 125) and defendant's reply to the Government's objection (docket No. 131).

In light of codefendant Héctor Santiago-Alicea's declaration in his Motion Pursuant to Order (docket No. 136) that "he will not testify at a separate trial on behalf of Marilyn Gotay-Colón and Catalino Torres-Maldonado..., "the Court finds that defendants have not met their threshold burden of demonstrating a reasonable probability that the proffered testimony will

be forthcoming. United States v. Drougas, 248 F.2d 8, 9 (1st Cir. 1984); United States v. Parodi, 703 F.2d 768, 779 (4th Cir. 1983). Accordingly, the Magistrate's Report and Recommendation is not adopted and the defendants' Joint Motion for Severance (docket No. 95) is hereby DENIED.

Trial is hereby scheduled for January 27, 1992 at 9:00 a.m.

IT IS SO ORDERED.

San Juan, Puerto Rico, This [written] 9th day of January, 1992.

[Signed Illeg.]
RAYMOND L. ACOSTA
United States District Judge
United States Court of Appeals
For the First Circuit

No. 92-1849

UNITED STATES,
Appellee,

v.

Catalino Torres-Maldonado
and Marilyn Gotay-Colon,
Defendants, Appellants,

No. 92-1850

United States,
Appellee,

v.

Hector Santiago-Alicea
Defendant, Appellant,

No. 92-1851

United States,
Appellee,

v.

Teddy Leon Ayala
Defendant, Appellant,

No. 92-1852

United States,
Appellee,

v.

Oscar Diaz Cruz,
Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Raymond L. Acosta, U.S. District Judge]

Before

Stahl, Circuit Judge,
and DiClerico,* District Judge.

Jose A. Fuentes Agostini with whom Dominguez & Totti was on brief for appellant Torres-Maldonada [sic] and Gotay-Colon.

Ramon Garcia Garcia on brief for appellant Santiago-Alicea.

Carlos R. Noriega on brief for appellant Ayala

Harry R. Segarra on brief for appellant Diaz Cruz.

Kathleen A. Felton, with whom Charles E. Fitzwilliam, United States Attorney, Warren Vazquez, Assistant United States Attorney, and Nina Goodman, Department of Justice, were on brief for appellee.

January 20, 1994

*Of the District of New Hampshire, sitting by designation.

STAHL, Circuit Judge. Defendants-appellants challenge various aspects of their drug and firearms convictions, arguing, inter alia, that insufficient evidence supports their convictions, and that their motions for severance and for suppression of evidence were improperly denied. We reverse the firearms convictions of two defendants and affirm all other convictions.

I.

FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

For purposes of defendants' challenges to the sufficiency of the evidence, we begin by reciting the facts in the light most favorable to the government. United States v. Mena-Robles, 4 F.3d 1026, 1029 (1st Cir. 1993). Spanning a two-week period in late February and early March of 1991, a group of individuals, including defendants, occupied Rooms 310, 311 and 327 of the Carib Inn Hotel in Isla Verde, Puerto Rico. Two of the rooms were registered to false names.

Soon, the activities of the occupants of all three rooms attracted the attention of hotel employees. The hotel's chief of security observed "continual" visits to occupants of all three rooms made by young people who often drove luxury cars and stayed for periods of about ten minutes. In a hotel of 225 guest rooms, the group in the three rooms received 90% of all phone calls made to the hotel. Moreover, the group paid their hotel bills in cash, using bundles of small denominations wrapped in rubber bands. On a few occasions, the occupants paid for all three of the rooms together in amounts totaling approximately $300 to $400. In addition, a "floor supervisor" in charge of maid service on defendants' floor at the hotel saw the occupants of all three rooms passing frequently among the three rooms. On March 6, 1991, the same floor supervisor observed two revolvers on top of a bureau in Room 327. She informed both the hotel's chief of security and local police, who in turn, contacted agents of the United States Bureau of Alcohol, Tobacco and Firearms (ATF). Later that day, ATF agents and local police officers began surveillance at the Carib Inn Hotel. At approximately 11:00 p.m. on March 6, 1991 the surveilling agents observed defendants Hector Santiago-Alicea (Santiago-Alicea), Teddy Leon Ayala (Leon), Oscar Diaz Cruz (Diaz) and Frankie Nieves-Burgos (Nieves-Burgos)[1] with an unidentified man in the hotel lobby. Santiago-Alicea was wearing a bulletproof jacket, and the agents noticed a bulge under the jacket which appeared to be a gun. The group proceeded from the lobby to the hotel parking lot where the unidentified individual, after opening the trunk of a car, opened a plastic bag inside the trunk and counted unidentified items inside the bag. He handed the bag to Santiago-Alicea, who then showed the contents to Leon, who gave a facial sign of approval and an affirmative nod of his head.

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1. Nieves-Burgos, convicted below, is not a party to this appeal.

Later that evening a second unidentified man arrived at the hotel, made a call on the hotel's "house phone," and was met shortly thereafter in the lobby by Nieves-Burgos and another defendant, Pedro Luis Ramirez-Rivera (Ramirez-Rivera).[2] After a brief conversation, Nieves-Burgos and Ramirez-Rivera went back upstairs. Shortly thereafter they reappeared with Santiago-Alicea, who then exchanged packages with the unidentified man. On March 7, 1991, the following day, Santiago-Alicea was observed waiting in the hotel parking lot, looking in all directions. A car pulled up to him and, after a brief conversation, Santiago-Alicea handed a small paper bag to its driver, received money in exchange, counted the money, put it in his pocket and returned to the hotel. On the basis of the foregoing events, ATF and local law enforcement officials obtained a search warrant for the three hotel rooms. On that same afternoon of March 7, 1991, they executed the warrant. Upon entering Room 311, they found defendant Catalino Torres-Maldonado (Torres-Maldonado) seated on the floor talking on the phone, and his wife, defendant Marilyn Gotay-Colon (Gotay-Colon), seated on the sofa. Nieves-Burgos and Ramirez-Rivera were stretched out on separate beds in the room, clad only in underpants. Santiago-Alicea was seated on the end of one of the beds.

Upon searching the room the agents found that Gotay-Colon's purse contained cocaine in a plastic bag which was marked with a picture of a unicorn. Her purse also held approximately $400 in cash in a bundle secured by a rubber band. In a zippered, opaque tote bag on the sofa on which Gotay-Colon was seated, the agents found $2000 in cash in a bundle, again secured by a rubber band, and a loaded semiautomatic pistol.

On a night table in the room, the agents found a plastic bag containing cocaine, approximately $1500 in cash, brown paper

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2. Ramirez-Rivera, convicted below, is not a party to this appeal.

bags and a homemade pipe used for smoking drugs. In the room's closet was the bulletproof jacket seen on Santiago-Alicea the night before. Under the bed, the agents found empty plastic bags labeled with a picture of a unicorn, along with plastic straw-and-spoon type implements typical of the sort used to cut and package drugs for re-sale. The agents also found razor blades, ordinary playing cards, and a stapler, all of which can be used to package drugs. They also found beepers and cellular telephones. Finally, the agents discovered keys to a gray Buick, which would later be searched by the agents.

Rooms 310 and 327 though unoccupied at the time of the search, also contained drugs and drug-related items. Room 310 contained fifty-five packets of cocaine, again marked with a unicorn, which were found in a brown paper bag hidden in a roll-away bed or sofabed. There was also a small amount of narcotics in an ashtray and a pipe used for smoking drugs. The search of Room 327 turned up a pillowcase hidden above a "dropped ceiling" in the bathroom. It contained sixteen brown paper bags, each of which, in turn, held 100 small packets marked with the unicorn symbol and filled with cocaine. Under a sofa, the agents found a bullet that fit the semiautomatic pistol found in Room 311. Later that day, Leon and Diaz, who had been present for one of the transactions the night before, but who had not been present during the search of Room 311, arrived at the hotel. Leon exclaimed, "Oh my god, they busted my people."[3]

The agents asked Leon and Diaz if they knew the occupants of Room 311. They replied in the affirmative. Leon was

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3. The parties agree that the exclamation was in Spanish, not English. One report stated that the exclamation was more closely translated as "They busted the people." Nonetheless, the officer who allegedly heard the remark testified at trial that the exclamation was, "Oh, my god, they busted my people."

carrying over $6700 in cash and a key to Room 310. Diaz had over $1400 in cash and a hotel receipt for Room 327.

The agents subsequently searched two cars in the hotel parking lot. In the first car, a green Ford LTD, they found a loaded .357 six-shot revolver, along with a photograph of Nieves-Burgos and a parking receipt with Nieves-Burgos' fingerprint on it. The second car searched was the gray Buick, keys to which had been found in the search of Room 311. In the Buick, the agents found a loaded nine millimeter pistol, with additional ammunition and one "spent" or fired bullet cartridge. Though the Buick was not registered in Santiago-Alicea's name, the registration to the car was found in Santiago-Alicea's wallet. Defendants were tried together. Torres-Maldonado, Gotay-Colon, Santiago-Alicea, Leon, and Diaz were all convicted of conspiring to possess cocaine with intent to distribute, and of possession of cocaine with intent to distribute. See 21 U.S.C. §§ 841(a)(1), 846.[4] Gotay-Colon was also convicted of possession of cocaine based on the amount found in her purse. See 21 U.S.C. § 844(a).[5] In addition, Torres-Maldonado, Gotay-Colon and Santiago-Alicea were convicted of using a firearm during and in relation to a drug offense. See 18 U.S.C. § 924(c)(1).[6] Defendants raise various grounds for appeal. We address them in turn.

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4. Section 841(a)(1) states in relevant part that "it shall be unlawful for any person knowingly or intentionally...to manufacture distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

5. Section 844(a) states, in relevant part, "It shall be unlawful for any person knowingly or intentionally to possess a controlled substance...." Section 846 states, "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

6. Section 924(c)(1) provides, in relevant part: "Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which

II.

DISCUSSION

A. Sufficiency of the Evidence

1. Standard of Review

In reviewing challenges to the sufficiency of the evidence, "[o]ur task is to review the record to determine whether the evidence and reasonable inferences therefrom, taken as a whole and in the light most favorable to the prosecution, would allow a rational jury to determine beyond a reasonable doubt that the defendants were guilty as charged." Mena-Robles, 4 F.3d at 1031. Moreover, "[w]e do not weigh witness credibility but resolve all credibility issues in favor of the verdict. The evidence may be entirely circumstantial and need not exclude every reasonable hypothesis of innocence; that is, the fact finder may decide among reasonable interpretations of the evidence." United States v. Cassiere, 4 F.3d 1006, 1011 (1st Cir. 1993) (quoting United States v. Batista-Polanco, 927 F.2d 14, 17 (1st Cir. 1991))

2. Conspiracy and Possession with Intent to Distribute

Torres-Maldonado and Gotay-Colon claim that the evidence at trial showed no more than their "mere presence" at the hotel. We have recently stated that "the culpability of a defendant's presence hinges upon whether the circumstances fairly imply participatory involvement. In other words, a defendant's 'mere presence' argument will fail in situations where the 'mere' is lacking." United States v. Echeverri, 982 F.2d 675, 678 (1st Cir. 1993). While the government's evidence against Torres-Maldonado and Gotay-Colon is less

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provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years ...."

abundant than its evidence against several other defendants, it is nonetheless sufficient to support a finding of guilt beyond a reasonable doubt as to the conspiracy and possession counts. Hotel personnel testified that both Torres-Maldonado and Gotay-Colon were associated with the group that occupied Rooms 310, 311 and 327. A front desk supervisor identified Torres-Maldonado as a member of the group who had been present when cash payments were made for the three rooms, and the floor supervisor mentioned above testified that she observed Gotay-Colon passing between the three rooms. She recalled a specific instance when Gotay-Colon went to Room 327 with Santiago-Alicea.

In addition, drugs and drug paraphernalia were lying in open view in Room 311 at the time of Torres-Maldonado's and Gotay-Colon's arrest. Torres-Maldonado was talking on the phone when the agents entered, allowing an inference that he and Gotay-Colon were more than mere visitors. The cocaine found in Gotay-Colon's purse which was packaged in a bag bearing the unicorn symbol, further supports that inference. Finally, the bundle of cash, secured characteristically with a rubber band, provides further evidence linking the couple to the group in the hotel and to drug-related activity. In sum, there is sufficient record evidence from which a reasonable jury could conclude beyond a reasonable doubt that Torres-Maldonado and Gotay-Colon were guilty of both conspiracy and possession with intent to distribute the drugs found at the hotel, and that, on the basis of the drugs found in her purse, Gotay-Colon was guilty of simple possession.

Even more compelling evidence, both direct and circumstantial, supports the conspiracy and possession convictions of the other defendants in this case. For example, a jury could reasonably infer that Leon, Diaz, and Santiago-Alicea were observed by ATF agents making the very drug transactions which serve as the basis for their conspiracy and possession convictions. Therefore, we conclude that sufficient evidence supports those convictions.

3. The Firearms Convictions

Santiago-Alicea, Torres-Maldonado and Gotay-Colon also challenge the sufficiency of the evidence supporting their convictions under 18 U.S.C § 924(c)(1) for using a firearm during and in relation to a drug offense.

a. Santiago-Alicea

Santiago-Alicea was observed wearing a bullet-proof vest with a protruding bulge beneath it. So clad, he engaged in what appeared to be a drug deal in the parking lot of the Hotel Carib Inn. Using the same standard of review recited above, we conclude that a reasonable jury could have found beyond a reasonable doubt that the bulge was one of the guns found in the drug raid, and that Santiago-Alicea was "using" the gun, as that term is used in section 924(c)(1), during and in relation to a drug offense. Accordingly, we affirm his conviction.

b. Torres-Maldonado and Gotay-Colon

While there are several possible grounds upon which section 924(c)(1) liability may rest, the evidence against Torres-Maldonado and Gotay-Colon is insufficient to support a section 924(c)(1) conviction under any applicable theory.

(1) Pinkerton Liability

We begin by noting that, although members of a conspiracy may be held liable for substantive crimes committed by a coconspirator in furtherance of the conspiracy, see, e.g., Pinkerton v. United States, 328 U.S. 640, 646-47 (1946); United States v. Barker Steel Co., 985 F.2d 1123, 1128-29 (1st Cir. 1993), the jury in this case was not so instructed.[7] On appeal, we will not infer either that the jury found guilt based on a theory upon which it was not instructed, or that the jury would have found guilt had it been given a Pinkerton instruction. See

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7. Nor has the government argued, either below or on appeal, that Pinkerton liability should apply to hold Torres-Maldonado and Gotay-Colon liable for the use of firearms by their coconspirators.

United States v. Labat, 905 F.2d 18, 23 (2d Cir. 1990) (citing Nye & Nissen v. United States, 336 U.S. 613 618 (1949)); United States v. Raffone, 693 F.2d 1343, 1346 (llth Cir. 1982) (similar), cert. denied, 461 U.S. 931 (1983). Accordingly we decline to affirm defendants' firearms convictions on Pinkerton grounds.

(2) Actual or Constructive Possession

The government argues essentially that the physical proximity of Torres-Maldonado and Gotay-Colon to the gun found in the tote bag at the time of the arrest is sufficient to support an inference that they "used" or were prepared to use the gun in a drug transaction for section 924(c)(1) purposes.[8]

We disagree. It is well established that a weapon need not be "brandished, displayed, or discharged" in order to sustain a conviction under section 924(c)(1). See United States v. Castro-Lara, 970 F.2d 976, 983 (lst Cir. 1992), cert. denied, 113 S. Ct. 2935 (1993); United States v. Plummer, 964 F.2d 1251, 1255 (lst Cir.), cert. denied, 113 S. Ct. 350 (1992). Nonetheless, there must be some facilitative nexus between the weapon and the criminal activity." Castro-Lara, 970 F.2d at 983. Moreover, in order to establish that a defendant "used a firearm for purposes of section 924(c)(1), "the government must prove that the defendant actually or constructively possessed it." United States v. Harrison, 931 F.2d 65, 71 (D.C. Cir.), cert. denied, 112 S. Ct. 408 (1991). See also United States v Long, 905 F.2d 1572, 1576 & n.6 (D.C. Cir.), cert. denied, 498 U.S. 948 (1990). In this case, we find neither actual nor constructive possession.

The government's evidence does not establish that either Torres-Maldonado or Gotay-Colon had any direct or actual possessory interest in the firearm in the bag. In fact, one

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8. The government does not argue, nor does the evidence support an inference, that Torres-Maldonado and Gotay-Colon's convictions under Section 924(c) could be supported by the gun found during the searches of the two cars in this case.

government witness, who had been asked to identify particular government exhibits, was also asked to state which defendant appeared to own or control each exhibit. Upon identifying the bag which contained the gun at issue, the witness replied that it was linked to [n]o defendant. No further evidence in the record tends to show that either Torres-Maldonado or Gotay-Colon ever exercised actual possession over the gun or the bag. The evidence of constructive possession is equally scant. Constructive possession exists when a person "knowingly has the power and intention at a given time to exercise dominion and control over an object, either directly or through others". United States v. Garcia 983 F.2d 1160, 1164 (lst Cir. 1993) (citations and internal quotations omitted). Unlike the evidence against the other defendants who are party to this appeal, the evidence against Torres-Maldonado and Gotay-Colon failed to establish any connection between these two defendants, on one hand, and those drug distribution transactions which appeared to involve guns, on the other.

When viewed in the light most favorable to the government, the evidence shows that only one group of the defendants, which did not include either Torres-Maldonado or Gotay-Colon, was involved in armed drug deals in and around the hotel. Additional evidence linking Torres-Maldonado and Gotay-Colon to the group qenerally falls far short of establishing that either defendant knew of or participated in the armed drug deals. Cf. United States v. Matthews, 942 F.2d 779, 783-84 (10th Cir. 1991) (affirming drug conspiracy and possession convictions and reversing conviction under section 924(c)(1) where the sole explanation for the presence of the weapons was to provide conspirators with protection on drug-selling "excursions," and where evidence showed that defendant had not participated in any such excursions); United States v. Bruce, 939 F.2d 1053, 1055-56 (D.C. Cir. 1991) (reversing conviction under section 924(c)(1) despite gun's presence in an apartment containing drugs, on grounds that

gun's intended use was "for defendant's protection at the time and place of subsequent distribution") (emphasis added).

Finally, there was no additional evidence tending to show that either Torres-Maldonado or Gotay-Colon exercised any "dominion and control" over any firearms, see, e. g., Garcia, 983 F.2d at 1164, that they had any "appreciable ability to guide the destiny" of firearms, see, e.g., United States v. Staten, 581 F.2d 878, 883 (D.C. Cir. 1978), or that these defendants ever had some stake in, some power over" the firearms found, see, e.g., United States v. Pardo, 636 F.2d 535, 549 (D.C. Cir. 1980). Cf. Matthews, 942 F.2d at 783-84 (reversing section 924(c)(1) conviction where there was no evidence "that [defendant] intended to avail himself of the firearms in question"); United States v. Feliz-Cordero, 859 F.2d 250, 254 (2d Cir. 1988) (holding that a loaded gun "found in the same room as drug paraphernalia during the course of a search pursuant to a warrant was, standing alone, insufficient to support a conviction under section 924(c)(1)). We conclude that there was insufficient evidence to allow a jury to conclude beyond a reasonable doubt that Torres-Maldonado or Gotay-Colon actually or constructively possessed a firearm for purposes of section 924(c)(1).

(3) Aiding and Abetting

Given such a lack of evidence of actual or constructive possession, the firearms convictions of Torres-Maldonado and Gotay-Colon may stand, if at all, only upon a theory that they aided and abetted in the use of the gun.[9] The government's evidence, however, is insufficient to uphold a conviction on an aiding and abetting theory.

It is well settled in the case law interpreting section 924(c)(1) that an accomplice "must have known to a practical

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9. The indictment in this case included one count which charged all defendants with using, and with aiding and abetting in the use of, a firearm.

certainty that the principal would be [using] a gun." United States v. Powell, 929 F.2d 724, 728 (D.C. Cir. 1991). See also United States v. Williams, 985 F.2d 749, 756 (5th Cir.) (Because the evidence does not support an inference that [nonpossessing defendants] knew the gun was available to possessing codefendant], the evidence is insufficient to support [nonpossessing defendants'] convictions on [a section 924(c)(1)] count."), cert. denied, 114 S. Ct. 148 (1993); United States v. Nelson, 733 F.2d 364, 371 (5th Cir.) ("[W]e believe that in order to convict [defendant] on the theory that [coconspirator] aided and abetted [defendant], the government had to prove that [defendant] knew that [coconspirator] was carrying a firearm while the latter was carrying out the directions of the former."), cert denied, 469 U.S. 937 (1984).

In this case, there is insufficient evidence from which a jury could conclude beyond a reasonable doubt that Torres-Maldonado or Gotay-Colon knew of the use of the gun at any time. As noted above, while it is clear that Torres-Maldonado and Gotay-Colon had some ties to the group at the hotel, there is no evidence that they were involved in, or knew of, that part of the group's activities which involved guns. In addition, given that the gun was concealed in a tote bag when the officers entered the room, there is no evidence that either Torres-Maldonado or Gotay-Colon knew of the gun's presence at the time of the arrest. Thus, we conclude that there was insufficient evidence to support the section 924(c)(1) convictions of either Torres-Maldonado or Gotay-Colon on a theory of aiding and abetting. Cf. United States v. Thomas, 987 F.2d 697, 701-02 (11th Cir. 1993) (reversing section 924(c)(1) conviction where nothing in the government's case linked defendant to gun possessed by a codefendant).

In sum, no evidence links either Torres-Maldonado or Gotay-Colon to the gun in the zippered bag, to the armed drug transactions or even to the bullet-proof vest found in the closet of Room 311. Given this dearth of evidence connecting either

of these defendants to any firearm in this case, we reverse their convictions under section 924(c)(1).

B. Severance

1. Torres-Maldonado and Gotay-Colon

Prior to trial, Torres-Maldonado and Gotay-Colon filed a joint motion for severance. Attached to the motion was an affidavit from codefendant Santiago-Alicea, who stated that he was willing to testify at a separate trial that Torres-Maldonado and Gotay-Colon were "unaware" of any activities related to drugs or firearms, and that the couple had merely come to the Carib Inn Hotel in order to pick up money that Santiago-Alicea owed on a car that he had purchased from Gotay-Colon's brother.

Initially, a magistrate judge recommended that severance be granted. Santiago-Alicea, however, after conferring additionally with counsel, subsequently withdrew his offer to testify at a separate trial, whereupon the district court denied the motion for severance. Torres-Maldonado and Gotay-Colon appeal the order denying their severance motion.

We begin by noting that "a trial judge has 'considerable latitude' in deciding severance questions and that the judge's resolution of them 'will be overturned only if that wide discretion is plainly abused.'" United States v. O'Bryant, 998 F.2d 21, 25 (lst Cir. 1993)(quoting United States v. Natanel 938 F.2d 302, 308 (lst Cir. 1991), cert. denied 112 S. Ct. 986 (1992)). Moreover, the Supreme Court has recently stated that "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro v United States, 113 S. Ct. 933, 938 (1993) Finally, we have recently reiterated that where, as here, a defendant seeks severance in order to secure the testimony of a codefendant, s/he must demonstrate, inter alia, that the codefendant "'will in fact testify if the cases are severed.'" See United States v. Nason, 9

F.3d 155, 158 (lst Cir. 1993) (quoting United States v. Drougas, 748 F.2d 8, 19 (lst Cir. 1984)).

Torres-Maldonado and Gotay-Colon sought severance in order to secure Santiago-Alicea's testimony. Aside from an unsubstantiated blanket claim of prejudice, Santiago-Alicea's initial offer to provide exculpatory testimony formed the sole basis for Torres-Maldonado and Gotay-Colon's motion for severance. Thus, even by the reasoning set out in Torres-Maldonado and Gotay-Colon's own motion for severance, once Santiago-Alicea withdrew his offer to testify at a separate trial, he also withdrew the entire basis of his codefendants' severance motion. Because the district court was given no additional justification for ordering a separate trial, we find no abuse in its denial of Torres-Maldonado and Gotay-Colon's severance motion. Moreover, nothing at the joint trial prevented Torres-Maldonado and Gotay-Colon from putting on evidence from sources other than Santiago-Alicea in order to corroborate their contention that they were merely visiting the hotel with regard to car payments. In fact, one witness so testified. In sum, Torres-Maldonado and Gotay-Colon failed to establish that a joint trial would compromise any "specific trial right," see Zafiro, 113 S. Ct. at 938, nor did they make the "strong showing of evident prejudice," O'Bryant, 998 F.2d at 25, which is required to obtain severance. Accordingly, the district court did not abuse its discretion in denying their motion.

2. Leon

Leon sought severance based upon the opening remarks of counsel for one of his codefendants, Pedro Panzardi Fuentes (Panzardi), who was acquitted below. During his opening, Panzardi's counsel stated inter alia, "It is not my job to be a prosecutor in this case. So I don't have to prove who did it. It is the government's duty to prove our client guilty beyond a reasonable doubt. But we will prove to you, from the same evidence the government collected, that during a period of time, starting at the beginning of the year, the group which was

trafficking in drugs was...using the name Panzardi from those days."

Leon understood these remarks and others in Panzardi's opening statement to mean that Panzardi planned to bring evidence which would at once aid the government in proving its case against all of the other defendants and exonerate Panzardi. Leon unsuccessfully sought severance based upon potential prejudice from Panzardi's trial tactics. Upon careful review, we find no error in the district court's denial of this motion. The sole basis for Leon's severance motion, both below and on appeal, has been the opening statement of Panzardi's counsel. A close reading of that opening statement shows that it was carefully, indeed artfully, worded by Panzardi's counsel to emphasize that Panzardi's innocence would be proven irrespective of the guilt of any of his codefendants.[10] Moreover, Leon points to no evidence at trial which was introduced or referred to by Panzardi that inculpated Leon or any of the other defendants.

The strongest possible basis for Leon's motion to sever is his view that Panzardi's defense would be antagonistic to his own. As we have recently stated, however, "[t]he fact that two defendants assert antagonistic defenses does not, per se, require severance, even if defendants are hostile or attempt to cast blame on each other. United States v. McLaughlin, 957 F.2d 12, 18 (1st Cir. 1992). Rather,"the antagonism in defenses must be such that if the jury believes one defense, it is compelled to convict the other defendant." United States v. Angiulo, 897 F.2d 1169, 1195 (1st Cir.), cert. denied 498 U.S. 845

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10. Panzardi's counsel referred to a "group which was trafficking drugs" without asserting that Panzardi's codefendants actually comprised that group. In fact, counsel concluded his opening statement by arguing that the government's poor investigation had led to "a very bad investigation and possibly to the acquittal of more than one person in this case. Hopefully, my client and whoever else is innocent." [emphasis supplied].

(1990). Leon has made no such showing in this case. The jury could have readily believed Panzardi's argument that his name was used by a group of people at the hotel, and nonetheless have acquitted Leon. [11] In sum, Panzardi's opening remarks did not amount to a strong showing of prejudice to Leon, nor were they subsequently accompanied by prejudicial tactics at trial. Accordingly, the district court did not err in denying Leon's motion for severance.

C. Evidence Acquired Incident to the Warrantless Arrest

Both Leon and Diaz argue that they were arrested without probable cause, and that therefore the items seized from their persons during their arrest should have been suppressed. Again, we disagree. In the context of warrantless arrests ,as elsewhere, "[p]robable cause must be evaluated in light of the totality of circumstances." United States v. Uricoechea-Casallas 946 F.2d 162, 165 (lst Cir. 1991). Moreover, in order to establish that probable cause existed for such an arrest, the government "need not present the quantum of proof necessary to convict." Id. See also United States v. Morris, 977 F.2d 677, 684 (lst Cir. 1992) (same, cert. denied, 113 S. Ct. 1588 (1993); United States v. Figueroa, 818 F.2d 1020, 1023 (lst Cir. 1987) (same). Rather, it need only show that, at the time of the arrest, the facts and circumstances known to the arresting officers were sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense. Id.; see also Beck v. Ohio, 379 U.S. 89, 91 (1964). The arrests of Leon and Diaz clearly met these standards.

Both Leon and Diaz had been observed on the evening prior to their arrest engaging in what appeared to be a drug deal. They were apprehended the following day returning to an

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11. For instance, the jury was free to reason that Leon was never sufficiently identified as a member of the group at the hotel, or that, while he was a member of the group, the government's evidence did not sufficiently link him to the drug transactions at issue.

area of the hotel which had recently been searched and which yielded large quantities of drugs, drug paraphernalia, and firearms. Finally, they admitted knowing members of the group who had been arrested earlier in the day. In total, the circumstances of this case indicate that the arresting officers had probable cause to believe that both Leon and Diaz had committed or were committing an offense. Therefore, their arrest was lawful. Moreover, it is well established that [i]f an arrest is lawful, the arresting officers are entitled to search the individual apprehended pursuant to that arrest." Uricoechea-Casallas, 946 F.2d at 165. Accordingly, the district court did not err in admitting the evidence recovered in that search.

We have carefully considered all defendant's other claims and find them to be without merit.

III.

CONCLUSION

For the foregoing reasons, the convictions of Torres-Maldonado and Gotay-Colon under 18 U.S.C. § 924(c)(1) are vacated. All other convictions and sentences are affirmed.

United States Court of Appeals
For the First Circuit

No. 92-1849

UNITED STATES,
Appellee,

v.

CATALINO TORRES MALDONADO
AND MARILYN GOTAY-COLON,
Defendants-Appellants.

BEFORE

STAHL, Circuit Judge,
COFFIN, Senior Circuit Judge,
and DICLERICO,* District Judge.

ORDER OF COURT

Entered: March 7, 1994

Appellants petition for rehearing is denied.

By the Court:

FRANCIS P. SCIGLIANO, CLERK

By [Cecilia B. Martin]
Deputy Clerk

*Of the District of New Hampshire, sitting by designation.

[cc: Mr. Fuentes Agostini and Ms. Felton]